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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

METROPOLITAN EDISON COMPANY, NEW JERSEY CENTRAL POWER AND LIGHT COMPANY, PENNSYLVANIA ELECTRIC COMPANY,
Petitioners,

v.

PEOPLE AGAINST NUCLEAR ENERGY, *et al.*,
Respondents,

and

UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA,
Petitioners,

v.

PEOPLE AGAINST NUCLEAR ENERGY, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

With consent of all the parties, the National Association of Manufacturers (NAM) files this brief in support of the Petitioners. The NAM is a non-profit voluntary business association incorporated under the laws of the State of New York. NAM has a membership of approximately 11,000 manufacturing and related business concerns which represents an estimated 80 percent of all goods manufactured in the United States. Most of NAM members are involved in developing and maintaining America's industrial and energy base. As such, the NAM membership is continually regulated by various government agencies including the Nuclear Regulatory Commission (NRC). Additionally, any agencies whose activities require compliance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.*, will have an effect on NAM members. We feel if this decision is not addressed by this Court there is a great potential for mischief in all areas of the government that deal with NEPA mandates. Although the Court of Appeals for the District of Columbia Circuit endeavored to put limits on the effect of this decision, the potential breadth of other applications by other government agencies or departments of this decision could have widespread effects and, as such, have a profound impact on the membership of NAM. Offering this broad base of representation, we believe we present this Court a perspective beyond that represented by the Petitioners.

SUMMARY OF THE CASE

In March of 1979 there was an accident at the Three Mile Island Nuclear Station Unit 2 (TMI 2). At that time, Three Mile Island Unit 1 (TMI 1) was shut down for ordinary maintenance and refueling. The NRC then ordered TMI 1 to be shut down indefinitely pending a hearing to determine safety-related issues at the plant. At the same time the Commission stated that it did not know whether psychological stress would be regarded as

legally relevant to any determination relating to the restarting of Unit 1. Petitioners, People Against Nuclear Energy (PANE), attempted to intervene in the hearing on the restart of TMI 1 alleging that the TMI 2 accident had caused severe trauma and stress and that the reopening of TMI 1 would aggravate and perpetuate this stress. The NRC ultimately excluded PANE's contentions from the hearing. PANE thereafter filed suit and on May 14, 1982, an amended final judgment was rendered by the United States Court of Appeals for the District of Columbia Circuit. The decision requires the NRC to determine if there is sufficient new information regarding psychological health since the license for TMI 1 was issued. If there is such information, the NRC must then prepare a supplemental environmental impact statement which would include a comprehensive evaluation of the psychological health effects relating to the restart of TMI 1.[1]

SUMMARY OF THE ARGUMENT

This decision deviates from other precedents in that the court of appeals makes an unwarranted extension of NEPA. This will ultimately impact other federal agencies that must implement NEPA requirements. This result is inconsistent with the decision of this Court in *Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), which defines the role of a court in reviewing agency actions.

Further, this decision allows consideration of factors under NEPA which have no causal relationship to the human environment. In this instance, the question concerns psychological stress or fear which will be aggra-

[1] The decision of the court also involved a finding of "continuing agency responsibility" which would require the NRC to update environmental impact statements. This issue, although involved in the decision regarding psychological stress, is not being raised in either Petition for Writ of Certiorari.

vated by the operation of a nuclear power plant. The fear is not associated with the safety of the power plant but rather exists due to a prior accident at a different unit. Aggravated fear or stress without some nexus to the environment is not contemplated by NEPA. These erroneous conclusions by the Court of Appeals for the District of Columbia Circuit merit consideration by the Supreme Court.

THE ARGUMENT

I. The Decision of the Court of Appeals is an Unwarranted Extension of Its Review Authority

In 1954 the United States Congress made a decision to facilitate development of our nuclear energy capabilities by enacting the Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq.* This reflected a deliberate congressional decision to establish a national policy goal relative to the future energy needs of our nation. Recognizing the need of man to live in harmony with and preserve the integrity of our environment, the Congress subsequently passed the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* One of the principal aims of the passage of NEPA was to assure that environmental concerns were addressed in a manner consistent with other national policies. Striking the proper balance between outwardly conflicting national policy concerns is frequently difficult when dealing with environmental impacts, but this Court has previously stated:

> NEPA announced a national policy of environmental protection and placed a responsibility upon the Federal Government to further specific environmental goals by "all practicable means, consistent with other essential considerations of national policy." NEPA § 101(b), 42 USC § 4331(b) [42 USCS § 4331(b)]. *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976).

Far from attempting to preserve the balance struck by the NRC, the court below seems to have substituted its

own judgment about the development of nuclear energy for that of Congress and the NRC. As such, the decision below does little more than encourage the use of NEPA as a barrier to implementation of other national policy objectives. Nor can this potential be viewed only in the context of NRC related activities. For example, in 1976 Congress passed the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* which concerns the siting of hazardous waste disposal sites. The potential that this activity will engender similar reactions to the siting and operation of a nuclear energy plant cannot be overestimated. NEPA was intended to promote accommodation of environmental concerns to the extent possible, rather than to delay or prevent the implementation of other congressionally established national policies, by those who are philosophically opposed to those policies.

This Court has previously enunciated the role of the judiciary in reviewing agency activities under NEPA. Most recently this Court stated:

> On the contrary, once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot " 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.' " *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980) (per curiam).

This Court also looked at the role of the judiciary in reviewing agency procedures pursuant to congressional direction.

> Even apart from the Administrative Procedure Act this Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments. *Vermont Yankee Nuclear*

> *Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978).

Similarly in *Vermont Yankee*, this Court limited the judiciary from improperly imposing its preference beyond the purview of a court's authority. This Court stated:

> It is in the light of this background of statutory and decisional law that we granted certiorari to review two judgments of the Court of Appeals for the District of Columbia Circuit because of our concern that they had seriously misread or misapplied this statutory and decisional law cautioning reviewing courts against engrafting their own motions of proper procedures upon agencies entrusted with substantive functions by Congress. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 525 (1978).

Thus, this Court has recognized that the role of the judiciary must remain impartial to public policy interpretation such as the policy encouraging the development of nuclear energy. The NRC exercised agency discretion in its determination of what it was required to do. However, the court's decision would require the agency to consider additional factors, previously not interpreted as activating NEPA obligations. While endeavoring to focus its attention on the specific factual situations presented, the court ignores other precedents simply because they do not have the "holocaust potential of an errant nuclear reaction." *People Against Nuclear Energy v. United States Nuclear Regulatory Commission*, 678 F.2d 222, 229 (D.C. Cir. 1982).[2] Clearly, the court below expanded its role beyond that of merely reviewing the sufficiency of the agency's procedural activities and has instead imposed its own preferences. As such, this decision represents a new precedent inviting similar efforts by those who seek to postpone or indefinitely delay implementation of controversial federal statutes.

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[2] The opinions of the Court of Appeals is also printed as Appendix A in the Petition filed by Metropolitan Edison Co., *et. al.*

II. The Decision of the Court of Appeals Conflicts with Other Court Decisions

The concept of psychological stress and its relationship to the environment has been considered by various courts of appeals. To date, none of these courts have been persuaded that psychological stress represents a primary impact on the environment. The Sixth Circuit determined "Although factors other than the physical environment have been considered, this has been done only when there existed a primary impact on the physical environment." *Breckinridge v. Rumsfield*, 537 F.2d 864, 866 (6th Cir. 1976), *cert. denied*, 429 U.S. 1061 (1977).

The Second Circuit looked at psychological and socio-economic consequences and held:

> For the most part opposition is based upon a psychological distaste for having a jail located so close to residential apartments. . . . It is doubtful whether psychological or sociological effects upon neighbors constitute the type of factors that may be considered in making such a determination since they do not lend themselves to measurement. *Hanly v. Kleindienst*, 471 F.2d 823, 833 (2nd Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

Similarly, in *Nucleus of Chicago Homeowners Association v. Lynn*, 524 F.2d 225, 231 (7th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976), the court had to consider the question of whether low income housing constituted an impact recognizable under NEPA. In so doing it stated:

> To the extent that this claim can be construed to mean HUD must consider the fears of the neighbors of prospective public housing tenants, we seriously question whether such an impact is cognizable under NEPA.

Indeed, the Court of Appeals for the D.C. Circuit itself has previously questioned the relationship of NEPA to

stress or fear-related factors with low-income workers being located in a suburban setting. Thus, in *Maryland-National Park and Planning Commission v. United States Postal Service*, 487 F.2d 1029, 1037 (D.C. Cir. 1973), the D.C. Court stated:

> Concerned persons might fashion a claim, supported by linguistics and etymology that there is an impact from people pollution on "environment," if the term be stretched to its maximum. We think this type of effect cannot fairly be projected as having been within the contemplation of Congress.

The court below now seems to take an inconsistent approach to this issue predicated on the fact this case involves a nuclear energy plant and is more threatening, in its view, than any other factual situation presented to other courts. However, stress considerations must be accorded the same attention whether they relate to the proximity of prisons or nuclear energy plants. In the dissenting opinion, Judge Wilkey recognizes that fear associated with the operation of a nuclear plant cannot be distinguished from other situations and states:

> *In each case, however, what we are dealing with are fears and anxieties; if NEPA embraces fears and anxieties in one, it must in all. PANE v. United States Nuclear Regulatory Commission*, 678 F.2d at 241 (Wilkey, dissenting) (emphasis in original).

In this case, the allegation is that the fear of the restart of TMI 1 would aggravate existing fear and anxiety. There may always be fear associated with the proliferation of the use of nuclear energy. However, allowing the aggravation of existing fear, without related environmental consequences, to require further assessments or impact statements is an unwarranted extension of NEPA.

This situation was also considered in footnote 13 of *First National Bank of Chicago v. Richardson*, 484 F.2d 1369 (7th Cir. 1973), where the court states:

> "[i]t is doubtful whether psychological and sociological effects upon neighborhoods constitutes the type of factors that may be considered in making such a determination since they do not lend themselves to measurement." 471 F.2d at 833. As regards public "sensibilities" aroused by criminal defendants, we question whether such factors, even if amenable to quantification, are properly cognizable in the absence of clear and convincing evidence that the safety of the neighborhood is in fact jeopardized.

Apart from argument that court precedent will not support the court's determination, there also is a lack of causal connection between the alleged stress and the activity at TMI 1. Respondents allege that there is existing fear due to the accident at TMI 2 and renewed operation of TMI 1 would aggravate this existing fear. Fear and stress are speculative and perceptual considerations and it would put an unreasonable burden on any agency with NEPA obligations to require detailed impact statements dealing with perceptual problems particularly when they are not even directly related to the operations under consideration. Without an appropriate nexus, the opportunities for raising objections stemming from unrelated environmental considerations would be virtually limitless. It is a chimera to expect agencies to anticipate any residual reaction to environment actions, particularly reactions that have no immediate relationship to the environment and reactions that are perceptual and individualistic. To achieve the aims of NEPA, agencies must be able to have reasonable parameters within which they make their determinations. In this case, this nexus is absent. Aggravated fear is too remote and speculative to require further NEPA inquiry. The determination of the court is an unwarranted extension of the Act.

CONCLUSION

In summary, this case represents two departures from precedent and legislative mandate by the court of appeals. In the first instance, the court is not following a prescribed interpretive role, but is imposing its own determinations of the congressional purpose of NEPA. This is not in keeping with precedents of this Court and could have broad reaching effects on any other case which would involve the application of NEPA.

Secondly, the court's interpretation of the focus of psychological stress is inappropriate to the purpose of NEPA. At the very least, health effects must bear a causal relationship to the environment to be given the application suggested by the court of appeals.

For these reasons, the Petitions for the Writ of Certiorari should be granted.

Respectfully submitted,

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